

**CASE # 1387**

BEFORE THE DEPARTMENT  
OF  
NATURAL RESOURCES AND CONSERVATION

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IN THE MATTER OF APPLICATION                    )  
FOR BENEFICIAL WATER USE PERMIT                )  
NO. 1387-s40R by ROBERT McLEAN                )  
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PROPOSAL FOR DECISION

Pursuant to the Montana Water Use Act, Section 89-865, et seq., R.C.M 1947, after due notice, a hearing on objections to the above-named Application was held on November 20, 1974 at the Sheridan County Courthouse. The Applicant appeared and presented testimony. The Objector, Mr. Ole Wang, appeared and presented testimony. Neither was represented by counsel. The Objector offered into evidence copies of two water rights which he has filed with the Clerk and Recorder of Sheridan County. These copies were marked Objector's exhibits #1 and #2 and received into evidence without objection.

PROPOSED FINDINGS OF FACT

1. On January 24, 1974 at 8:21 a.m., Robert McLean made application with this Department for Beneficial Water Use Permit, Application No. 1387-s40R. The Application is for 2 acre-feet of water for stockwater purposes from January 1 to December 31 inclusive, but testimony at the hearing indicated that the actual period of use is May 1 to November 1. The water is to be stored behind a small dam in a pit reservoir located on an unnamed tributary of Attor Creek in the SW $\frac{1}{4}$  SE $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 3, Township 35 N., Range 56 E., Sheridan County. Approximately 50 head of cattle will water from the pit.
2. On May 24, 1974 an Interim Permit was issued by this Department as requested in the Application. No work has been commenced pursuant to said Interim Permit.
3. On August 16, 1974 Mr. Ole Wang of Plentywood, Montana filed a timely objection to the Application requesting that it not be granted for reason that said pit reservoir would have an unreasonable adverse effect on his prior existing water right.
4. The Objector introduced as evidence of his prior existing right two above mentioned exhibits which are copies of notices of water right appropriation. Exhibit

#1 lays claim to 400 miners inches or 20 acre-feet appropriated from Attor Creek by means of an earth filled dike and to be used on the NW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 16. The priority date of this right as filed is March 22, 1972.

Exhibit #2 claims 1200 miners inches (60 acre-feet) of the water of Attor Creek impounded by means of a reservoir located in the NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 16 and to be used on the same NW $\frac{1}{4}$  NW $\frac{1}{4}$  Section 16. The priority date of this right as filed is August 1, 1945.

5. Testimony at the Hearing indicates that Mr. Wang irrigates 15 acres of hay land in the NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 16 and that he owns 120 head of cows but only pastures his bulls in the pasture immediately surrounding the reservoir located in the NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 16. Testimony indicated that the capacity of this reservoir is 15 acres-7 or 8 feet deep at the face of the dam. By planimeter studies, Analysts from this Department estimate the reservoir to cover 2 acres. If the water is 7 feet deep at the face, the capacity would be approximately 5.6 acre-feet.

6. Observation of the Plat map from the Department files and used at the hearing to locate the Applicant's proposed diversion works and the Objector's existing diversion works indicates that the Applicant's proposed pit is over 1.5 miles upstream from the Objector's reservoir. Also there are several unobstructed water sources to Objector's reservoir including the main stem of Attor Creek.

7. Testimony indicates that the Applicant intends to conform to A.S.C.S. engineering plans in constructing the said pit reservoir and that he intends to respect existing rights.

8. Attor Creek is ordinarily a dry coulee and flows only in the Spring runoff or during periods of heavy rainfall. The unnamed tributary, site of the proposed pit reservoir, is a small dry coulee which contributes a small proportion of the total streamflow of Attor Creek.

9. Testimony indicated that the Objector's reservoir has filled to capacity and overflowed many times in the last 30 years.

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PROPOSED CONCLUSIONS OF LAW

1. The Objector has an apparent prior existing right to the use of the waters of Attor Creek. Because Montana Water Law measures the quantity of a water right by the beneficial use of the water, the quantities of water claimed in the Objector's exhibits are greatly exaggerated. The Objector's water right can be generously estimated at 57 acre-feet by considering 3 acre-feet as necessary for irrigating each of the 15 acres and by considering 12 acre-feet as necessary to water 120 head of cattle (10 head per acre-feet).

2. Except in very dry years, the Applicant's proposed pit reservoir does not constitute an unreasonable adverse effect on Objector's apparent prior existing water right.

3. There are often unappropriated waters in the source of supply.

PROPOSED ORDER

1. The Application for Beneficial Water Use Permit is granted subject to the following conditions:

- (A) Objector's prior existing right, and any other existing water rights.
- (B) Installation of a bypass drainage device in order to protect existing rights.
- (C) The pit reservoir be constructed according to A.S.C.S. engineering plans.

NOTICE: This is a proposed Order and will become final when accepted by the Administrator, Division of Water Resources, Department of Natural Resources and Conservation, pursuant to Section 82-4212, R.C.M. 1947, and Rule MAC 1-1.6(2)-P6190. Written exceptions to this proposed Order shall be filed with the Administrator within five (5) days of service of this proposed order upon the parties herein. Upon receipt of any written exceptions, opportunity will be afforded to file briefs and make oral arguments before the Administrator.

\_\_\_\_\_  
Date

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James Lewis  
Hearing Examiner

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